IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-450

INGRAM CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Ingram Corporation respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 24, 1976.

OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears as Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1975, and this Petition was filed within

30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an order permitting disclosure of grand jury materials to persons other than attorneys for the government and denying other relief is appealable to the Court of Appeals.

2. Whether such an order is improper under Rule 6(e) of the Federal Rules of Criminal Procedure.

3. Whether, after an order permitting the use of grand jury materials for the purpose of a *civil* investigation had been in effect for almost two years, the District Court erred in denying relief designed to cure the past effects of improper disclosures of such materials.

STATUTE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

STATEMENT OF THE CASE

Petitioner is a corporation with its headquarters in New Orleans, Louisiana. It has been a target of a grand jury investigation in Chicago, Illinois, since at least the spring of 1975. On June 14, 1974, the Government applied for, and obtained, an order permitting disclosure of grand jury transcripts and documentary evidence to persons other than attorneys for the Government, and for purposes other than criminal investigation. Specifically, the order provided that:

> inspectors and agents of the Internal Revenue Service, Federal Bureau of Investigation, and Postal Inspection Service be granted access to subpoened books, records, and transcripts of testimony, or copies there of, of the Special March 1974 Grand Jury . . . presently impaneled in this District, which books, records, and transcripts are in the custody and control of the said Grand Jury in order to determine whether there have been civil or criminal violations of Titles 18 and 26, United States Code.

Petitioner's counsel were not provided with a copy of this order until December 1975. By that time, the grand jury had obtained huge quantities of documents from the petitioner, and a number of petitioner's employees had testified before the grand jury.

Shortly thereafter, petitioner challenged the June 14, 1974 order in the District Court for the Northern District of Illinois, requesting that the June 14 order be vacated and that an evidentiary hearing be held to determine the extent of the improper disclosures made under that order. The District Court modified the order, omitting any reference to the use of grand jury materials for civil purposes. The court declined to

vacate the June 14 order, however, and it declined to grant any retrospective relief whatsoever.

The petitioner took an appeal to the Seventh Circuit, arguing that both the June 14, 1974 order and the subsequent modification were inconsistent with the principles of grand jury secrecy and Rule 6(e) of the Federal Rules of Criminal Procedure. Relying on the text of Rule 6(e) and case law construing that Rule, petitioner argued that disclosure of grand jury materials could be made only to "attorneys for the government" or "preliminarily to or in connection with a judicial proceeding" on a particularized showing of compelling need. See *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). Since agents of the IRS, FBI and Postal Service do not fall within the statutory definition of "attorneys for the Government," and since no showing of compelling need had been made, petitioner contended that the open-ended disclosure of grand jury materials to a variety of federal agents was wholly improper. In addition, and independently, petitioner contended that since the grand jury had apparently been used for *civil* investigative purposes for almost two years, the District Court should have vacated the June 14, 1974 order and conducted the requested evidentiary hearing.

The Court of Appeals dismissed the appeal for want of appellate jurisdiction, suggesting in passing that Ingram Corporation would have a sufficient remedy for any abuses of the grand jury process if and when a civil action was brought against it. Alluding to the merits, the court stated that petitioner would not in any event be entitled to an evidentiary hearing on the question of improper disclosure of grand jury materials, since "wholesale disclosure of the government's

investigation via an evidentiary hearing would be manifestly unfair to the government." (App., p. 7a, *infra*)

REASONS FOR GRANTING THE WRIT

1. *The court below erred in holding that the District Court's order was unappealable, and its ruling conflicts with several other appellate court decisions.*— The Court of Appeals conceded that other courts have entertained appeals from orders similar to the one in this case.[1] The Court dismissed these prior cases, however, on the ground that they contained "little or no discussion of jurisdiction."[2] (App., p. 8a, *infra*) Yet in one of those cases the court adverted to the jurisdictional question and squarely resolved it in favor of finding appellate jurisdiction. *In re Biaggi, supra.* The decision below thus created a conflict in the circuits on this issue that this Court should resolve.

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[1] Among the contrary cases are *United States* v. *Universal Mfg. Co.*, 525 F.2d 808 (8th Cir. 1975); *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973); *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963); *In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1972); *Doe* v. *Rosenberry*, 255 F.2d 118 (2d Cir. 1958); *In re Special February 1971 Grand Jury*, 490 F.2d 894 (7th Cir. 1973); *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956).

[2] The court also sought to distinguish these cases on the ground that none of them "involved a situation where a criminal indictment was returned and no apparent threat of a civil suit based on evidence obtained in violation of the grand jury secrecy rules existed." Whatever its relevance, however, this purported distinction is inapplicable here. Indictments were in fact returned in at least two of the cited cases—*In re Grand Jury Proceedings* and *In re April 1956 Term Grand Jury*—while in this case an indictment was not returned against the corporation (although two of its officers were indicted). Moreover, the likelihood *vel non* of civil proceedings was not deemed a controlling factor in any of the cited cases.

Additionally, the opinion of the court below manifested a misconception of the issue that could cause serious mischief in future cases. The court determined that since the corporation could raise the issue of improper grand jury disclosures in any future civil litigation, it was not necessary for the court to address the issue at this time. However, this overlooks two important facts raised below: First, petitioner's claim was that grand jury materials were being disclosed to unauthorized persons as well as for unauthorized purposes. Even if no civil use was made of the materials and no civil action ever brought, petitioner's rights under F.R. Crim. P. 6(e) would still have been violated by the improper disclosure of the materials to persons other than attorneys for the government. Second, the case law relating to the use of grand jury materials in civil proceedings strongly suggests that those materials would be admitted even if they were initially improperly disclosed. See, *e.g., United States* v. *Procter & Gamble Co.*, 187 F. Supp. 55, 63 (D.N.J. 1960); *United States* v. *Carter Products, Inc.*, 27 F.R.D. 243, 248 (S.D.N.Y. 1961). Thus, the remedy proposed by the Court of Appeals would likely be no remedy at all.

Finally, recent cases in analogous areas demonstrate that the court below should have assumed jurisdiction over the instant appeal. Two circuits have recently held that orders disqualifying attorneys representing witnesses before grand juries are appealable. *In re Grand Jury Empaneled January 21, 1975,* 536 F.2d 1009, 1011 (3d Cir. 1976); *In re Investigation Before April 1975 Grand Jury,* 531 F.2d 600, 605 n.8 (D.C. Cir. 1976). Similarly, the First Circuit recently held an order denying a protective order against the improper use of the grand jury subpoena power to be

appealable. *United States* v. *Doe,* 455 F.2d 1270, 1273 (1st Cir. 1972). The rationale behind the holdings in each of these cases was that the appeals in each case concerned "important rights which would be irreparably lost if review were denied now." *In re Grand Jury Empaneled January 21, 1975, supra,* at 1011. In this case, similarly, an immediate appeal is the only means of vindicating the corporation's rights under Rule 6(e) and the principles of grand jury secrecy. If the corporation is not indicted, it will have no forum in which to raise those rights; if it is ultimately indicted, it will face the line of cases that have held that a violation of Rule 6(e) is not a ground for dismissing an indictment;[3] and, as noted above, a subsequent civil action, even if one should be brought, would not provide a meaningful opportunity to litigate the issues of grand jury abuse. Accordingly, as in *Perlman* v. *United States,* 247 U.S. 7, 13 (1918), the order below must be held appealable because, absent a present right of review, the corporation will be "powerless to avert the mischief of the order." See also *United States* v. *Ryan,* 402 U.S. 530, 533 (1971).

For these reasons, the Court should grant the writ and reverse the ruling below.

2. *Disclosure such as that permitted by the orders in this case is improper under F.R. Crim. P. 6(e).*—Since the Court of Appeals strongly suggested that petitioner could not prevail on the merits, it is appropriate for this Court to consider the underlying dispute in this case as well as the question of appellate jurisdiction.

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[3] See, *e.g., United States* v. *Hoffa,* 349 F.2d 20, 43 (6th Cir. 1965), *aff'd,* 385 U.S. 293 (1967); *United States* v. *Schiavo,* 375 F. Supp. 478 (E.D. Pa. 1974).

The order below is inconsistent with the plain command of Rule 6(e). The first two sentences of the Rule provide the only grounds for breaches of the rule of grand jury secrecy. Disclosure of grand jury materials is permitted under the second sentence of Rule 6(e) only upon a showing of compelling need and, as noted above, no such showing was made in this case. Disclosure is permitted under the first sentence of the Rule only to "attorneys for the government," a term that does not encompass any of the agents listed in the disclosure order entered in this case. See F.R. Crim. P. 54(c). While courts have occasionally permitted limited disclosure of grand jury materials to federal agency personnel where their expertise has been needed to help present complex or technical materials to the grand jury, the courts in these cases have permitted the agents access to grand jury materials only to the extent necessary to their chore of assisting the grand jury in the performance of its duties. *United States* v. *Universal Mfg. Co., supra; In re April 1956 Grand Jury, supra.*[4] These cases do not permit the agents access to grand jury materials in order to enable their various agencies to make independent use of the materials, *e.g.*, to prepare a tax case or a penalty action against a potential defendant. Since the orders entered in this proceeding in no way limited the scope and purpose of the disclosures made to the outside agents, the orders

[4] The proposed amendment to Rule 6(e) forwarded by this Court to the Congress on April 26, 1976, would codify this principle. As is pointed out in the Senate Report on legislation delaying the effective date of the proposed amendment, the amended Rule 6(e) would not permit open-ended disclosure of grand jury materials to federal agents, but would permit only that disclosure necessary "to assist the attorneys for the government in the performance of their duties." S. Rep. No. 94-990, 94th Cong., 2d Sess. 3 (June 25, 1976).

were flatly contrary to Rule 6(e) and should be reversed.

3. *The District Court should have granted retrospective relief to cure the effects of past improper disclosures.*—Both the District Court and the Court of Appeals acknowledged that using the grand jury for a civil investigation would be improper. Moreover, the order of June 14, 1974, which had been in effect for almost two years, authorized precisely this use of grand jury materials: It granted federal agents access to "subpoenaed books, records and transcripts . . . in order to determine whether there have been *civil or criminal* violations of Titles 18 and 26, United States Code." (emphasis added) Yet when petitioner requested an evidentiary hearing to determine the extent of the improper disclosures and to cure the effects of those disclosures, the District Court denied the request. The Court of Appeals went even farther, stating that "wholesale disclosure of the government's investigation via an evidentiary hearing would be manifestly unfair to the government," and that holding an evidentiary hearing "would be blatantly improper." This, we submit, was error.

The Eighth Circuit has recently held that in similar cases, evidentiary hearings may well be necessary. *United States* v. *Universal Mfg. Co., supra.* Moreover, Judge Becker, in a thorough and careful analysis of the issues raised by disclosure requests under Rule 6(e), ordered an evidentiary hearing on facts far less egregious than those in this case. See *Robert Hawthorne, Inc.* v. *Director of Internal Revenue,* 406 F. Supp. 1098, 1104 (E.D. Pa. 1975). In light of the showing made by petitioner that the grand jury mate-

rials were apparently used for civil purposes,[5] and in view of the lengthy period in which the unlawful order was in effect, an evidentiary hearing should have been ordered.

The Court of Appeals' response that the evidentiary hearing would have required "wholesale disclosure of the government's evidence" simply misconceives the nature of the hearing requested. The hearing would determine what outside agents were given access to grand jury materials and whether those agents used the materials for civil investigative purposes. Since the materials in question were all provided by petitioner and its employees, there would be no real "disclosure of evidence" at all. In addition, the hearing would in no significant way interfere with the grand jury's investigation, since it would focus on the conduct of outside agents armed with grand jury materials, not on the conduct of the grand jury itself. Accordingly, the alarm sounded by the Court of Appeals was quite beside the point, and contrary to the cases that have recognized the need for evidentiary hearings in this context.

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[5] In its request for an evidentiary hearing, petitioner showed that one of the IRS special agents assigned to the criminal investigation of the corporation had access to grand jury materials, and that he was working closely with the revenue agents who were conducting a civil tax audit of the corporation. In fact, the special agent at one point obtained an extension of the civil statute of limitations for the revenue agents from one of petitioner's employees. Two other IRS agents informed one of petitioner's attorneys that there were two investigations in train, one criminal and one civil, and a fourth agent informed petitioner's attorneys that the IRS and the grand jury were conducting separate investigations. That agent was apparently working for both the IRS and the grand jury throughout the period that the various investigations were pending.

CONCLUSION

Both the procedural and substantive issued presented by this case have been increasingly before the lower federal courts in recent years. Questions of the appealability of orders issued in the course of grand jury proceedings have been decided by at least three courts of appeals this year alone, and a fourth case is currently pending in the Ninth Circuit. *J.R. Simplot Co.* v. *United States,* No. 76-1893, argued August 16, 1976. On the merits, the courts have been struggling during the past few years over the extent to which disclosure of grand jury materials can be permitted, and the purposes for which such disclosure is appropriate. See *Robert Hawthorne, Inc.* v. *Director of Internal Revenue, supra.* Because of the confusion plaguing the lower courts on both of these issues, and because the ruling of the court below was contrary to the views of various other courts of appeals, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1372

IN RE: SPECIAL MARCH 1974 GRAND JURY POSSIBLE VIOLATIONS OF TITLE 18 AND 26, UNITED STATES CODE.

APPEAL OF: INGRAM CORPORATION.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 74 GJ 1010

No. 76-1419

INGRAM CORPORATION,

Petitioner,

v.

HON. JAMES B. PARSONS, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Respondent.

Original Petition for Writ of Mandamus

HEARD JUNE 15, 1976 — DECIDED AUGUST 24, 1976

Before SPRECHER, BAUER, *Circuit Judges,* and CAMPBELL, *Senior Judge.**

BAUER, *Circuit Judge.*

The question presented on this appeal is whether an appellate court has jurisdiction to review an order denying Ingram Corporation's request for an evidentiary hear-

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* The Hon. William J. Campbell, United States District Court for the Northern District of Illinois, is sitting by designation.

ing to determine whether there were improper disclosures of grand jury materials in violation of Rule 6(e) of the Federal Rules of Criminal Procedure.[1]

In March 1974 a special grand jury was summoned in the Northern District of Illinois to investigate possible violations of the criminal code. After the grand jury was convened the government obtained *ex parte* an order [2] which granted other government agents the right to review the evidence presented before the grand jury. The order authorized them to review the materials to determine whether any criminal or civil violations had occurred.

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[1] Rule 6(e) states:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise, a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

[2] The order, which was issued by Chief Judge Robson on June 14, 1974, provided that:

> "[I]nspectors and agents of the Internal Revenue Service, Federal Bureau of Investigation, and Postal Inspection Service be granted access to subpoenaed books, records, and transcripts of testimony, or copies thereof, of the Special March 1974 Grand Jury . . . presently impanelled in this District, which books, records, and transcripts are in the custody and control of the said Grand Jury in order to determine whether there have been civil or criminal violations of Titles 18 and 26, United States Code."

Attorneys for Ingram, upon discovering the order, objected because it allowed government agents to review the evidence before the grand jury to determine if civil violations occurred. As a general rule the grand jury investigates matters which are possible violations of the criminal laws. Counsel for Ingram appeared before the Chief Judge, who supervises the grand jury, and sought to have all the evidence relating to alleged civil violations ruled inadmissible for purposes of future litigation. In addition Ingram sought an evidentiary hearing to determine the extent and nature of the actions taken by government investigators under the order. The Chief Judge amended the order by striking out the reference to civil violations but refused to conduct an evidentiary hearing.

Subsequently, Ingram renewed its motion for an evidentiary hearing and submitted several affidavits showing: (1) that grand jury materials were allegedly being used by the IRS for the purposes of both civil and criminal investigations, and (2) that IRS agents allegedly were working simultaneously for their own agency and for the grand jury. Ingram argued that the evidence in these affidavits required a hearing on whether the grand jury process had been abused both by making grand jury materials available to unauthorized persons and by improperly using the grand jury's powers to aid a civil investigation.

In response to the renewed motion for an evidentiary hearing, the two Assistant United States Attorneys in charge of the grand jury investigation filed affidavits with the court asserting unequivocally that the only purpose of the grand jury inquiry was to determine whether there had been criminal violations and that disclosure had only been made to agents of the government in order to

assist in making that determination. The Chief Judge denied Ingram's renewed motion. Ingram filed a notice of appeal and a petition for a writ of mandamus. Since oral argument an indictment has been returned by the grand jury charging various officers of Ingram with criminal violations stemming from an alleged multi-million dollar bribery-fraud scheme.

I.

As a general rule an interlocutory decision in a criminal case stemming from action taken by a grand jury is not a proper subject for review by a court of appeals. The Supreme Court expressed this view in *Cobbledick* v. *United States,* 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940) when it held that an order compelling testimony or the production of documents before a grand jury was non-appealable. The Court stated:

> "The proceeding before a grand jury constitutes 'judicial inquiry', *Hale* v. *Henkel*, 201 U.S. 43, 66, of the most ancient lineage . . . The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue." 309 U.S. at 327-28.

Since *Cobbledick* the Supreme Court has consistently rejected attempts to expand appellate jurisdiction over on-going criminal investigations and trials. See *United States* v. *Ryan,* 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed 2d 85 (1971); *Di Bella* v. *United States,* 369 U.S. 121, 82

S.Ct. 654, 7 L.Ed. 2d 614 (1962); *Carroll* v. *United States,* 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed. 2d 1442 (1957). In *Ryan, supra,* Justice Brennan stated at p. 533:

> "Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual claim have we allowed exceptions to this principle."

One exceptional situation noted by the Court was presented in *Perlman* v. *United States,* 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918). There the Court allowed an immediate review of an order directing a third party to produce exhibits which were the property of appellant and, so he claimed, immune from production. To deny immediate interlocutory review,, the Court stated, would have left Perlman "powerless to avert the mischief of the order." *Id.* at 13.

Unlike the previous Supreme Court decisions the petitioner in this case does not seek to appeal the denial of a motion to quash subpoenas. Rather Ingram seeks review of a denial of a motion to disclose the work of the grand jury by conducting an evidentiary hearing. Since we believe the same rule of non-appealability that was expressed in *Cobbledick* applies, we must determine whether the denial of an appeal would leave Ingram "powerless to avert the mischief of the order," as in *Perlman, supra.*

In re Grand Jury Investigation of Violations (General Motors), 318 F.2d 533 (2d Cir. 1963) involved a factual situation quite similar to the case before us. There appellants unsuccessfully sought a protective order in the trial court to prevent grand jury materials from being used in a related but separate criminal action then pending in another jurisdiction. Accepting the government's representations, supported by an *in camera* affidavit, that the grand jury investigation had been instituted in good

faith and not for the purpose of simply gathering evidence to support the pending indictment, the district court denied the motion for a protective order. The Second Circuit dismissed the appeal of the denial on the ground that the order was not a final decision under the statute stating at 318 F.2d 535-36.

> "The denial of General Motor's motion here will in no way prevent it from asserting in the criminal trial in the Northern District of Illinois, if occasion should arise, that evidence proffered against it has been improperly obtained . . . Although the order refuses what General Motors deems the most efficicacious means of sealing off the evidence to be taken before the grand jury investigating perjury from the trial of the anti-trust indictment, it makes no final determination of General Motor's claim in that regard."

In *General Motors,* the district judge rejected the argument, which is also made in this case, that immediate intrusion into the grand jury investigation was necessary because of possible difficulties which might later be encountered in reconstructing whether or not the grand jury process had been abused. The Appeals Court agreed, pointing out that the dual policies of finality and of "avoiding undue delay in a grand jury proceedings" took precedence over those possible future difficulties and required "that the applicant be satisfied for the time being with the determination of the district judge . . ." *Id.* at 538. This Court reached a similar conclusion recently in *Application of Johnson,* 484 F.2d 791 (7th Cir. 1973), which involved an appeal from an order denying a motion to expunge and annul a grand jury report on the ground that the report violated the secrecy provisions of Rule 6(e). The Court held that such an order was not appealable.

In this case Ingram has failed to demonstrate how a denial of review will leave it powerless to correct an in-

justice eventually on a plenary review after the grand jury has ceased its investigation and the criminal trial has been conducted. Assuming *arguendo* that the original order approving a civil as well as criminal investigation was improper,[3] and, that there was a wrongful disclosure of grand jury materials to government officials to assist them in a civil prosecution, Ingram may still seek to prohibit introduction of evidence at a civil trial because it was improperly obtained. That alternative is much more attractive than conducting an evidentiary hearing into a grand jury investigation. Presently there is no civil action pending against Ingram arising out of this investigation. But there is a criminal action pending and wholesale disclosure of the government's investigation via an evidentiary hearing would be manifestly unfair to the government which has been preparing its case for over two years. To conduct an evidentiary hearing because a civil case may be

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[3] There is little doubt that absent some unusual circumstances the use of the grand jury to obtain evidence for a civil proceeding is improper. As this Court previously stated in *In re April 1956 Term Grand Jury* (Shotwell), 239 F.2d 263 (7th Cir. 1956) at p. 271:

> "With the consent of the grand jury this material has been turned over to treasury agents, who, with their assistants, have been examining it. If these efforts are directed toward the procuring of evidence for civil proceedings now or hereafter pending against petitioners, and that purpose is accomplished, then the secrecy of the grand jury has been breached. We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by third persons for the purposes of a civil proceeding. • • • With the grand jury came its time-honored policy of secrecy. The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings."

Also see *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958); *In re Holovachka,* 317 F.2d 834 (7th Cir. 1963).

brought in the future under these circumstances would be blatantly improper.

II.

Admittedly, many previous decisions have reached the merits of interlocutory problems involving the grand jury with little or no discussion of jurisdiction. See *United States* v. *Universal Manufacturing Co.*, 525 F.2d 808 (8th Cir. 1975); *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973); *In re Holovachka, supra; In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1972); *Doe* v. *Rosenberry*, 255 F.2d 118 (2d Cir. 1958); *In re April 1956 Grand Jury* (Shotwell), *supra; In re Special February 1971 Grand Jury* v. *Conlisk*, 409 F.2d 894 (7th Cir. 1973). However, none of these cases involved a situation where a criminal indictment was returned and no apparent threat of a civil suit based on evidence obtained in violation of the grand jury secrecy rules existed.

Ingram places great reliance upon our previous decision in *April 1956 Term Grand Jury* (Shotwell), *supra*, where a similar motion was made to open up the grand jury proceedings for public inspection. Although the Court did not discuss the jurisdictional issue it noted that a district court could not properly interfere with the actions of the grand jury. The Court refused to order a hearing but authorized a restraining order should grand jury secrecy be violated. Judge Schnackenberg stated at 239 F.2d 270:

> "In view of the independence of the grand jury and its traditional functions, on the showing made it would be incongruous for the district court to require the grand jury to produce its minutes in open court for examination, to assemble and interrogate it or the members thereof . . . and it would also be unwarranted for the court to quash all of the subpoenas on the ground

> of the constitutional violations charged. Any such actions by the district court would be gratuitous."

As a consequence, were we to ignore the jurisdictional question, or assume jurisdiction a la *silentio*, we would still be bound by the holding in *Shotwell* where petitioner's request for an evidentiary hearing was denied.

In another of this Court's previous decisions, *In re Holovachka, supra*, this Court assumed jurisdiction over an appeal from an order respecting grand jury secrecy. But *Holovachka* involved a situation where the district court ordered that the grand jury minutes be made available for use in a disbarment proceeding. The Court ruled that such a disclosure was improper. An appeal at that point was timely because the order authorized a disclosure to an administrative board over which the Circuit Court would have no jurisdiction. As a consequence, if the Court of Appeals did not hear the question, the petitioner would [have] had no forum in which to make his objection.

In *Special February 1971 Grand Jury* v. *Conslick, supra*, this Court was again faced with an appeal that required the Court to either immediately review the issues or not review them at all. There, five policemen moved to vacate orders authorizing disclosure to the superintendent of police of grand jury minutes to be used in a disciplinary hearing. The policemen had previously appeared before the grand jury and sought to prevent disclosure of their testimony. Since there was no federal charge pending, if the Court refused to hear the appeal there was no possible manner for the policemen to preserve an appeal on their claim that such disclosure violated the grand jury secrecy rules. Thus the Court had no choice but to take jurisdiction to preserve a question of significant legal dispute and concern.

In summary, a review of this Court's decision on questions presented by the grand jury proceedings indicates

that only in unusual circumstances will we deviate from the Supreme Court's advice in *Cobbledick, supra,* to prevent "undue interruption" by hearing interlocutory appeals. In *Holovachka,* and *Conlisk, supra,* where jurisdiction was assumed by this Court, an appeal was necessary to preserve an important issue. In contrast to this case there were no criminal cases pending which would be unduly interrupted and perhaps significantly affected by such a disclosure. In *Shotwell, supra,* although the Court assumed jurisdiction, it noted that a hearing into the grand jury proceedings would be unwarranted.

III.

Anticipating that this Court might not have jurisdiction, Ingram also filed a petition for a writ of mandamus pursuant to 28 U.S.C. § 1615(a) [4] and Rule 21 of the Federal Rules of Appellate Procedure.

Mandamus is an extraordinary remedy traditionally employed only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). A party seeking a mandamus must show that its right to the issuance of a writ of mandamus is "clear and indisputable," *Will* v. *United States,* 389 U.S. 90, 96, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), quoting *Bankers Life & Casualty Company* v. *Holland,* 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953).

The placing of such a heavy burden on the party seeking a mandamus and the requiring of exceptional circumstances

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[4] 28 U.S.C. § 1651(a) states:

'The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in and of their respective jurisdictions and agreeable to the usages and principles of law."

to activate appellate jurisdiction stems from the same policy considerations which gave birth to the finality statute. This attitude was correctly expressed in *Lampman* v. *United States District Court for the Central District of California,* 418 F.2d 215 (9th Cir. 1969), when the Court stated at p. 217:

> "Every consideration relating to piecemeal litigation and delay of grand jury proceedings on which the Supreme Court rested its decision in *Cobbledick* is equally applicable when we consider whether to exercise our jurisdiction under the All Writs Act."

If past decisions and policy considerations have necessitated the finding that the district court order is not final, and thus not appealable. we should not allow a disruption of the judicial process by a device of another make: the extraordinary writ of mandamus. *United States* v. *Grand Jury,* 425 F.2d 329 (5th Cir. 1970); *Application of Johnson, supra.*

By our decision today we do not seek to deny appellant's right to question an alleged abuse of the grand jury process. However, at this point in the litigation we believe that the criminal proceedings should go foward. In the event of a civil suit Ingram can again raise an objection to the misuse of the grand jury process, if such abuse occurred.

APPEAL DISMISSED FOR WANT OF JURISDICTION.

PETITION FOR A WRIT OF MANDAMUS IS DENIED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit